

BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

In the Matter of the Application) Application No. P-0007
of Aquila, Inc. seeking)
resolution of a dispute under)
Nebraska Revised Statute Section) GRANTED
57-1306.)
)
) Entered: February 10, 2004

BY THE COMMISSION:

On September 2, 2003, Aquila, Inc. (Aquila) filed an application with the Nebraska Public Service Commission (the Commission). In its application, Aquila requests that the Commission enter an order, pursuant to Neb. Rev. Stat. §§ 57-1301 to 57-1307 (2000 Supp.) and Title 291, Chapter 9 of the Nebraska Public Service Commission Pipeline Common Carriers Rules and Regulations, declaring that the Metropolitan Utilities District's (M.U.D.) proposed natural gas main extensions to serve the planned Cimarron Woods subdivision, located entirely in the extraterritorial zoning jurisdiction of La Vista (generally in the southwest corner of 96th Street and Harrison Street) are in violation of Neb. Rev. Stat. §§ 57-1301 et seq., and that M.U.D. must cease and desist extension of the proposed natural gas mains. Notice of the application was sent to M.U.D. via certified mail on September 5, 2003.

On September 18, 2003, M.U.D. filed its Answer to Aquila's Complaint and Affirmative Defenses. In its Answer, M.U.D. admitted that Neb. Rev. Stat. § 57-1304 provides Aquila with a rebuttable presumption that any enlargement or extension by Aquila within La Vista, a city it serves on a franchise basis, or La Vista's extraterritorial zoning jurisdiction is in the public interest. However, M.U.D. also asserted that Aquila main extensions within the Cimarron Woods subdivision could not be presumed to be in the public interest because the developer had chosen to enter into a contract with M.U.D. for natural gas service. M.U.D. also alleged that its proposed main extensions to serve the Cimarron Woods subdivision are in the public interest pursuant to Neb. Rev. Stat. §§ 57-1301 et seq.

A pre-hearing conference was held on October 27, 2003. During the conference, the parties agreed to proceed on an abbreviated basis and to submit the material facts to the Commission through affidavits, exhibits and proposed orders rather than a full hearing with testimony of witnesses. The affidavits, exhibits and proposed orders were offered to the Commission on December 19, 2003.

The provisions of Neb. Rev. Stat. §§ 57-1301 et seq., generally referred to as LB 78, went into effect August 28, 1999. (Joint Affidavit of Richard C. Loomis of Aquila, Inc. and Jerry E. Gohr of the Metropolitan Utilities District of Omaha at ¶3 ("Joint Affidavit" for citation purposes)).

M.U.D. operates as a natural gas and water utility in the City of Omaha, Nebraska, and its environs, including Sarpy County. (Joint Affidavit at ¶4).

Aquila operates as a natural gas utility in the eastern one-third of Nebraska, including Sarpy County. (Joint Affidavit at ¶5).

On July 24, 2003, Daniel Crouchley of M.U.D. sent a letter to Patrick Joyce, counsel for Aquila, informing him that M.U.D. had received an application requesting natural gas service to the Cimarron Woods subdivision in the southwest corner of 96th and Harrison Streets in Sarpy County. Mr. Crouchley further stated that M.U.D. intends to serve the Cimarron Woods subdivision and that the M.U.D. Board of Directors would consider the necessary natural gas main extensions at its August 1, 2003 Committee meeting and August 6, 2003 Board of Directors meeting. (Joint Affidavit at ¶8, Ex. 1).

On July 31, 2003, Mr. Joyce sent Mr. Crouchley a letter requesting that M.U.D. remove the proposed natural gas mains from consideration at the August 1 and August 6 meetings and explaining that Aquila has the rebuttable presumption that its natural gas main is in the public interest in that area. (Joint Affidavit at ¶9, Ex. 2).

On July 31, 2003, Mr. Crouchley sent Mr. Joyce a letter indicating that M.U.D. believed that service by M.U.D. to the Cimarron Woods subdivision is in the public interest and that the matter would remain on the agendas for the August 1 Committee meeting and August 6 Board of Directors meeting. (Joint Affidavit at ¶10, Ex. 3.).

On August 1, 2003, Alan Hersch of Aquila presented comments at the M.U.D. Committee meeting requesting that M.U.D. remove the natural gas main extensions necessary for service to the Cimarron Woods subdivision from the list of projects for action by the M.U.D. Board of Directors. (Joint Affidavit at ¶11, Ex. 4).

The capital expenditures for the proposed natural gas main extensions necessary to provide natural gas service to the Cimarron Woods subdivision were approved by the M.U.D. Board of Directors on August 6, 2003. (Joint Affidavit at ¶12, Ex. 5).

Tom Wurtz, M.U.D. General Manager, has stated that M.U.D. would not be seeking to serve the Cimarron Woods subdivision if the developer of the subdivision had not asked M.U.D. to provide service. (Joint Affidavit at ¶23-24, Ex. 13 and 14 at ¶11).

Aquila serves the City of La Vista on a franchise basis. (Joint Affidavit at ¶6). The planned Cimarron Woods subdivision and the proposed natural gas main extensions by M.U.D. are within Sarpy County inside the extraterritorial zoning jurisdiction of the City of La Vista and are outside the city limits and extraterritorial zoning jurisdiction of the City of Omaha. (Joint Affidavit at ¶7).

Aquila has existing natural gas main adjacent to the east, southwest, southeast and south sides of the Cimarron Woods subdivision. (Joint Affidavit at ¶14; Joint Affidavit at ¶22, Ex. 12).

M.U.D. has existing natural gas main adjacent to the north, west, southwest and northeast sides of Cimarron Woods. (Joint Affidavit at ¶15; Joint Affidavit at ¶22, Ex. 12).

M.U.D. asserts that it can service Cimarron Woods' natural gas requirements by installing two-inch mains. M.U.D. estimates that it would cost \$113,172 to install two-inch gas mains to serve Cimarron Woods. No customer contribution is required for these main extensions. In order to provide added reliability to existing service areas outside of Cimarron Woods, M.U.D. intends to actually install three-inch and two-inch mains, putting the total cost of the main extension project at \$140,156. M.U.D. would receive revenue credits of \$372,535 for these main extensions. (Stipulation at ¶17 and Ex. 7).

Aquila estimates that it would cost \$138,166 to install gas mains to serve Cimarron Woods. No customer contribution is required for these main extensions. Aquila policy requires that the present value of anticipated net revenues exceed \$0 and the projected five-year return on equity exceed 11.5 percent in order for gas main extensions to be economically feasible. The net present value for the gas main extensions to serve Cimarron Woods is \$132,094 and the projected five-year return on equity is 18.1 percent. (Stipulation at ¶18 and Ex. 8).

After receiving the application from the Cimarron Woods developer, M.U.D. prepared drawings, prepared a written economic feasibility analysis, submitted a Capital Expenditure Authorization form to its Board of Directors for approval, reviewed the project with its Board at a public Committee meeting and at a public monthly Board meeting, and had the project approved by its Board. (Ex. 11).

O P I N I O N A N D F I N D I N G S

This case falls squarely within our opinion issued in Application P-0005. As in that proceeding, this application requires the examination of a combination of related Nebraska statutes, § 57-1303 and § 57-1304.

Neb. Rev. Stat. § 57-1303 has been addressed at length in previous opinions on natural gas main extensions. In brief, the statute requires analysis of the economic feasibility of an extension, the impact on ratepayers, orderly development of natural gas infrastructure, duplication or redundancy of natural gas infrastructure and discrimination in extension. (Application No. P-0005 Order at 6). "It is the starting point for most challenges regarding whether a proposed or existing main extension meets the public interest criteria." (*Id.*).

The Nebraska Legislature has also enacted a separate statute applicable when a natural gas main is extended within the extra-territorial zoning jurisdiction of a city served on a franchise basis by an investor-owned natural gas utility. "In such a case, [Neb. Rev. Stat. § 57-1304 provides that] the investor-owned utility has a rebuttable presumption that its main extension is in the public interest and our detailed analysis of whether the utility has met the criteria set forth in § 57-1303 is not necessary unless the presumption has been rebutted." (*Id.*). Cimarron Woods is located within the extraterritorial zoning jurisdiction of the city of La Vista, which Aquila serves on a franchise basis. Thus, our analysis will focus on Neb. Rev. Stat. § 57-1304, which provides:

Enlargement or extension of area; rebuttable presumptions.

In determining whether an enlargement or extension of a natural gas service area, natural gas mains, or natural gas services is in the public interest pursuant to section 57-1303, the following shall constitute rebuttable presumptions:

(1) Any enlargement or extension by a metropolitan utilities district within a city of the metropolitan class or its extraterritorial zoning jurisdiction is in the public interest;

(2) Any enlargement or extension by an investor-owned natural gas utility within a city of the primary, first, or second class or village in which it serves natural gas on a franchise basis or its extraterritorial zoning jurisdiction is in the public interest; and

(3) Any enlargement or extension by a metropolitan utilities district within its statutory boundary or within a city of the first or second class or village in which it serves natural gas on a franchise basis or its extraterritorial zoning jurisdiction is in the public interest.

Neb. Rev. Stat. § 57-1304 (emphasis added).

The rebuttable presumption permits "a utility, serving a city on a franchise basis, to grow with the city it serves." (Application No. P-0005 Order at 8). A City "is allowed to plan the infrastructure of its growth for several reasons, not the least of which are safety and consistency. As recognized by the legislature, if a city is served by one utility, territory that will soon be part of the city should naturally be served by the same provider." (*Id.*). As in P-0005, the natural gas main being challenged in this matter is located entirely within the extraterritorial zoning jurisdiction of the city of La Vista, a city being served by Aquila on a franchise basis. Thus, the applicable statutory rebuttable presumption favors Aquila.

M.U.D., therefore, has the burden of overcoming the rebuttable presumption. M.U.D. has asserted that Aquila main extensions within the Cimarron Woods subdivision cannot be presumed to be in the public interest because the developer wants M.U.D. to provide the natural gas service to the subdivision. The Commission addressed a similar situation in P-0005, where the Commission specifically stated that, "M.U.D. cannot overcome the rebuttable presumption simply by asserting that it has entered into a contract with the developer." (*Id.*). The Commission explained that:

[p]rior to the enactment of Neb. Rev. Stat. § 57-1301 et seq., whichever utility obtained the developer contract provided service to the development. As discussed in previous orders, concerns such as public safety and wasteful duplication of facilities prompted the legislature to enact statutes governing

the expansion of natural gas utilities. If the Commission were to look only to who obtained the contract to determine who was entitled to serve a particular development, the Commission would vitiate the statute. As made clear under the statutes, the Commission's primary concern must be the public interest.

Id. at fn. 1 (emphasis added).

M.U.D. further asserts that it should be allowed to serve the Cimarron Woods subdivision because its proposed gas main extensions are alleged to be in the public interest pursuant to Neb. Rev. Stat. §§ 57-1301 et seq. In P-0005, however, the Commission explicitly held that "[p]rior to any consideration of whether M.U.D.'s proposed extension is in the public interest, M.U.D. must establish that Aquila's main is not." (Application No. P-0005 Order at 8) (emphasis in original). M.U.D. has submitted no evidence to indicate that Aquila's main is not in the public interest. Therefore, M.U.D.'s argument that its proposed gas main extensions meet the public interest criteria set forth in § 57-1303 is premature because M.U.D. has failed to first rebut the presumption in favor of Aquila.

Furthermore, M.U.D. has not demonstrated that its proposed natural gas main extensions into the Cimarron Woods subdivision are in the public interest. Indeed, M.U.D. is attempting to apply the provisions of § 57-1301 et seq. to advance its interests and those of its ratepayers, but M.U.D. seeks to read the statute too narrowly. The legislature intended that § 57-1301 et seq., including the rebuttable presumption of § 57-1304, act as a shield to protect the public as a whole, not merely the ratepayers of the utility whose mains are being challenged. At a minimum, M.U.D.'s proposed natural gas main extensions fail to meet at least four of the five statutory public interest criteria.

1) The impact M.U.D.'s extension will have on the existing and future natural gas ratepayers.

First, M.U.D. appears to have considered the impact on its own ratepayers, but not on all affected ratepayers. (Joint Affidavit at ¶20, Ex. 10 at p. 5) (asserting that M.U.D.'s proposed gas main extensions are in the public interest because "the mains will have a positive impact on M.U.D. ratepayers . . ." (emphasis added)). As in P-0005, both Aquila and La Vista had planned on Aquila serving La Vista's extraterritorial zoning jurisdiction and had intended to spread the costs of Aquila's infrastructure in La Vista over all its ratepayers. M.U.D.'s attempt to enter into this area and serve these customers

negatively impacts Aquila ratepayers, and M.U.D. has presented no evidence to the contrary. (Application No. P-0005 Order at 9).

Furthermore, the Affidavit of Richard C. Loomis demonstrates a future negative impact on both Aquila and M.U.D. customers. Cimarron Woods may ultimately be annexed by the City of La Vista. When this happens, a difference in natural gas providers within the same city will negatively impact both Aquila and M.U.D. ratepayers. Currently, Aquila pays property taxes on its system infrastructure and real estate, as well as a 5 percent franchise fee to La Vista, which the city uses to pay for day-to-day operations, such as police, fire, public works, parks, recreation, library and administrative services. (Affidavit of Richard C. Loomis at ¶2-3, Ex. A at AQ000018). Because M.U.D. is a government entity, M.U.D. is exempt from paying property taxes and is statutorily restricted to compensating local communities with a 2 percent payment in lieu of taxes. (*Id.*). According to Mr. Loomis, this discrepancy in franchise revenue will inevitably lead to La Vista increasing property taxes to subsidize for the lost "potential" franchise revenue, resulting not only in Aquila ratepayers paying greater franchise fees than M.U.D. ratepayers, but also in all ratepayers paying increased property taxes. (Affidavit of Richard C. Loomis at ¶3, Ex. A at AQ000019). Therefore, M.U.D.'s proposed gas main extensions to serve Cimarron Woods would have a negative impact on all natural gas utility ratepayers.

2) Whether M.U.D.'s extension will contribute to the orderly development of natural gas utility infrastructure.

Second, M.U.D. serving Cimarron Woods is inconsistent with the requirement that gas main extensions contribute to the orderly development of natural gas utility infrastructure as a whole. As the Commission explained in P-0005, "the orderly development requirement is not limited to scrutiny of whether a particular extension would be part of orderly growth of a particular natural gas utility; rather, the legislature requires consideration of orderly development of natural gas utility infrastructure as a whole." (Application No. P-0005 Order at 9). M.U.D. asserts that its mains are in the public interest because they contribute to the orderly growth of M.U.D.'s gas utility infrastructure, rather than the natural gas utility infrastructure as a whole. (Joint Affidavit at ¶20, Ex. 10 at p. 5). M.U.D. asserts that because it has gas distribution facilities to the north, east, west and southwest of Cimarron Woods and because "the City of La Vista cannot designate Aquila

to be the natural gas provider to areas within La Vista's zoning jurisdiction," service by M.U.D. to the Cimarron Woods subdivision contributes to the orderly development of natural gas utility infrastructure. (Joint Affidavit at ¶20; Ex. 10 at Interrogatory Answer No. 11). M.U.D.'s arguments are not persuasive. Since 1999, § 57-1304 and the rebuttable presumptions granted therein have formed part of the landscape in which all cities in Nebraska have planned their growth. La Vista has planned for its orderly growth, including its natural gas infrastructure, into what is currently its extraterritorial zoning jurisdiction. Additionally, Aquila has existing natural gas mains adjacent to the east, southwest, southeast and south sides of Cimarron Woods. M.U.D. admits that main extensions by Aquila into Cimarron Woods will contribute to the orderly development of natural gas utility infrastructure in the area. (Joint Affidavit at ¶19, Ex. 9 at Admission No. 9). Under these circumstances, orderly development of natural gas utility infrastructure can best be accomplished by allowing Aquila to serve Cimarron Woods.

3) Whether M.U.D.'s extension will result in duplicative or redundant natural gas utility infrastructure.

Third, M.U.D.'s proposed natural gas main extensions into Cimarron Woods will result in redundant natural gas utility infrastructure. M.U.D. alleges that because M.U.D. is "ready, willing and able to provide natural gas service to the Cimarron Woods subdivision, has gas distribution facilities to the north, east, west and southwest of the proposed Cimarron Woods subdivision and has a signed application for gas service from the developer of this subdivision, service by M.U.D. to the Cimarron Woods subdivision will not result in duplicative or redundant gas utility infrastructure." (Joint Affidavit at ¶20, Ex. 10 at Interrogatory Answer No. 10). In prior orders, however, the Commission has explained that "redundant" means "exceeding what is necessary or normal: superfluous." (Application No. P-0003 Order at 9); (Application No. P-0006 Order at 20). Because Aquila has a franchise agreement with La Vista, both La Vista and Aquila intended that Aquila, not M.U.D., serve La Vista's extraterritorial jurisdiction. Moreover, Aquila maintains existing natural gas main adjacent to the east, southwest, southeast and south sides of the Cimarron Woods subdivision. Therefore, M.U.D.'s proposed gas mains are not "necessary" because Aquila is currently ready, willing, able and expected to serve Cimarron Woods.

4) Whether M.U.D.'s extension is applied in a nondiscriminatory manner.

Finally, M.U.D.'s proposed natural gas main extensions into Cimarron Woods are discriminatory. As discussed above, Aquila currently pays a 5 percent franchise fee to La Vista. (Affidavit of Richard C. Loomis at ¶2). The franchise fee is actually a "tax" paid by each gas customer through Aquila to La Vista. (Affidavit of Richard C. Loomis at ¶3, Ex. A at AQ000018). Because M.U.D. is a government entity, state statute limits the franchise fee M.U.D. could collect from Cimarron Woods' ratepayers to no more than 2 percent. (*Id.*). Therefore, when La Vista annexes Cimarron Woods, Aquila ratepayers within the current corporate limits of La Vista will, at a minimum, pay 3 percent more per year in franchise fees to La Vista than the M.U.D. ratepayers. Moreover, as stated by Mr. Loomis in his Affidavit, the city could ultimately increase property taxes to make up for the difference in franchise revenue, resulting in Aquila ratepayers not only paying greater franchise fees than M.U.D. ratepayers, but also paying increased property taxes to make up for the lost franchise income. (Affidavit of Richard C. Loomis at ¶3, Ex. A at AQ000019).

M.U.D. appears to place great weight on the fact that the developer for Cimarron Woods applied to M.U.D. for natural gas service. M.U.D. has indicated that it would not be seeking to serve Cimarron Woods if the developer of the subdivision had not asked M.U.D. to provide service. (Joint Affidavit at ¶23-24, Ex. 13 and 14 at ¶11). However, the determination of which public utility should serve a particular area "is not governed by who contracted with whom and when . . . this case is determined on the basis of the statutory rebuttable presumption in § 57-1304." (Application No. P-0005 Order at 11). Although the Legislature enacted Neb. Rev. Stat. § 57-1305¹ to protect developer contracts with natural gas utilities, "[i]n order for § 57-1305 to apply, . . . the public interest criteria of § 57-1303 must be met for M.U.D.'s proposed main extension and the rebuttable presumption of § 57-1304 in favor of Aquila must be defeated." (*Id.*) (emphasis in original). The Commission has been explicit in its prior orders that the public interest is

¹ "A metropolitan utilities district or investor-owned natural gas utility shall not extend duplicative or redundant interior natural gas mains or natural gas services into a subdivision, whether residential, commercial, or industrial, which has existing natural gas utility infrastructure or which has contracted for natural gas utility infrastructure." Neb. Rev. Stat. § 57-1305 (2000 Supp.).

paramount and must take precedence over private contracts between utilities and the developers. (Application No. P-0003 Order at 8-10; Application No. P-0005 Order at 8). Because M.U.D. has not rebutted the presumption in favor of Aquila and M.U.D. has not presented sufficient evidence that its natural gas main extensions meet the statutory public interest criteria, we conclude that it is in the public's interest for Aquila to serve Cimarron Woods.

O R D E R

IT IS THEREFORE ORDERED by the Nebraska Public Service Commission that Aquila's proposed gas main extensions to serve the planned Cimarron Woods subdivision are in the public interest.

IT IS FURTHER ORDERED that M.U.D.'s proposed natural gas main extensions to serve the planned Cimarron Woods subdivision are not in the public interest.

IT IS FINALLY ORDERED that M.U.D. must cease and desist extension of the proposed natural gas mains into the planned Cimarron Woods subdivision.

MADE AND ENTERED at Lincoln, Nebraska, this 10th day of February, 2004.

NEBRASKA PUBLIC SERVICE COMMISSION

COMMISSIONERS CONCURRING:

Chairman

ATTEST:

Executive Director